

142865

00002

GARDNER, CARTON & DOUGLAS

SUITE 3400-QUAKER TOWER

321 NORTH CLARK STREET

CHICAGO, ILLINOIS 60610-4795

(312) 644-3000

TELEX: 25-3628

TELECOPIER: (312) 644-3381

WASHINGTON, D.C.

DENVER, COLORADO

SOUTHFIELD, MICHIGAN

WRITER'S DIRECT DIAL NUMBER

JEFFREY C. FORT

(312) 245-8722

May 17, 1990

Rodger Field
Associate Regional Counsel
United State Environmental
Protection Agency
Region V - 3rd Floor
111 West Jackson Boulevard
Chicago, Illinois 60604

Re: Applicability of RCRA Waste Pile Regulations to Former
Coke Plant Property

Dear Rodger:

As a result of our meeting on May 9, 1990, we understand that you are still considering whether the RCRA waste pile regulations are applicable or relevant and appropriate (ARAR) to the excavation of the soil from the new slip area and the placement of that soil on the former coke plant property. As specified in OMC's letter of May 4, 1990 and discussed at the meeting, OMC believes that RCRA, and more specifically the waste pile regulations, are not ARARs. While it appears we agree that the waste pile regulations are not applicable, it appears you are continuing to consider whether they are relevant and appropriate. For a regulation to be relevant and appropriate, the final NCP specifies that a requirement be both sufficiently similar and well suited to the site. See 55 Fed. Reg. 8666. (March 8, 1990). We believe the waste pile regulations do not satisfy these requirements, as applied to the excavation and temporary storage of the soil at the former coke plant property.

The final NCP provides guidance for determining whether a requirement is relevant and appropriate. In addition, the

final NCP specifically discusses when RCRA requirements are relevant and appropriate. 55 Fed. Reg. 8763. U.S. EPA also has published a draft guidance manual entitled "CERCLA Compliance With Other Laws Manual," August 8, 1988 (hereinafter "Manual"). This Manual was developed to assist in the selection of onsite remedial actions that meet the ARAR requirements of specified laws, including RCRA. The Manual reiterates that the determination of whether a requirement is relevant and appropriate is a two step process, based on whether a requirement is sufficiently similar and well suited.

Although U.S. EPA believes that RCRA requirements can be potentially relevant and appropriate to wastes other than those known to be hazardous, U.S. EPA emphasized that a number of the factors identified in §300.400(g)(2) should be considered in determining whether the requirement is relevant and appropriate.

"The similarity of the waste to RCRA hazardous waste or the presence of a RCRA constituent alone does not create a presumption that a RCRA requirement will be relevant and appropriate. . . . Thus, the decision about whether a RCRA requirement is relevant and appropriate is based on consideration of a variety of factors, including the nature of the waste and its hazardous properties, other site characteristics, and the nature of the requirement itself. EPA anticipates that it will often find some RCRA requirements to be relevant and appropriate at a site and others not, even for the same waste. This is because certain waste characteristics shared with RCRA hazardous waste may be more important than others when evaluating when a given requirement is relevant and appropriate." 55 Fed. Reg. 8763.

Thus, while the substances in question at the former coke plant property may be similar to a RCRA hazardous waste in some way, such as chemical composition, toxicity, mobility or persistence; not all of these properties are sufficiently similar to satisfy the relevant and appropriate standards.

The factors to be considered in determining relevant and appropriate requirements are set forth in the final NCP which states:

"EPA intends that the factors in Section 300.400(g)(2) should be considered in identifying relevant and appropriate requirements, but does not want to imply that the requirement and site situation must be similar with respect to each factor. . . . At the same time, similarity on one factor alone is not necessarily sufficient. . . . Rather, the importance of a

particular factor depends on the nature of the requirement and the site or problem being addressed and will vary from site to site. While the factors are useful in identifying relevant and appropriate requirements, the decision is based on professional judgment about the situation at the site and the requirement as a whole." 55 Fed. Reg. 8743.

It appears that your concern regarding the temporary storage of the excavated material at the former coke plant property relates to three of the eight factors for determining relevant and appropriate requirements. The three factors at issue and the reasons each factor - as it relates to the relevancy and appropriateness of the waste pile regulations - is not valid are outlined below.

Factor No. 1 - purpose of the requirements: This factor is intended to "consider the technical or health and environmental purpose of the requirement compared to what the CERCLA action is trying to achieve." 55 Fed. Reg. 8744. While we agree that the overarching goal in both RCRA and CERCLA is the protection of human health and the environment, the remaining purposes behind these regulations are divergent. Section 1003 of RCRA sets forth the Act's objectives. See 42 U.S.C. §6902. These objectives focus on minimizing the generation of hazardous waste from manufacturing processes and providing for proper management during the treatment, storage and disposal of these manufacturing wastes. With respect to disposal, RCRA focuses on the closure of disposal areas to ensure that these areas will be protected from future migration and contamination. In contrast, the purpose of the activity at the former coke plant property is to temporarily store material for a later comprehensive cleanup. That future cleanup is more similar to the activities and goals of RCRA closure.

The purpose of ARARs is to identify remediation goals and identify how remedial alternatives are to be implemented. See 55 Fed. Reg. 8711. In discussing the risk assessment to be conducted during the RI/FS, U.S. EPA noted that:

"CERCLA requires that all Superfund remedies be protective of human health and the environment, but provides no guidance on how this determination is to be made other than requiring the use of ARARs as remediation goals, where the ARARs are related to protectiveness. CERCLA . . . relies heavily on information concerning contaminant toxicity and the potential for human exposure to support its decision concerning protectiveness." 55 Fed. Reg. 8709.

The level of protectiveness offered by the waste pile regulations is not greater than the level of protectiveness achieved by the methodology outlined by Canonie in the letter dated May 4, 1990, especially when considering toxicity and potential for human exposure. This methodology meets the requirements of CERCLA regardless of the applicability of the waste pile regulations.

The specific goals underlying the waste pile regulations are found at 47 Fed. Reg. 32274 (July 26, 1982). In this Federal Register notice, U.S. EPA states that these standards are general design and performance goals that:

"emphasize environmentally protective design and construction features as well as complementary operating and maintenance practices The regulatory goal adopted in the design and operating standards is to minimize the formation and migration of leachate to the adjacent subsurface soil or groundwater or surface water The regulatory goal . . . is achieved differently with respect to different units." 47 Fed. Reg. 32312.

The waste pile regulations, and specifically the liner requirements, are intended to prevent the migration of waste during the active life of a unit. 47 Fed. Reg. 32314. It is apparent that these regulations are intended to regulate waste piles around which activity is conducted and where materials are continually added and removed from the pile. In contrast, the material to be excavated will be placed on the former coke plant property until a permanent remediation is chosen. No activities will be conducted that would affect this material in any way.

Although the overarching purpose of both RCRA and CERCLA is the protection of human health and the environment, that purpose can be achieved through a variety of methods. Because ARARs do not exist for every contaminant, location or waste management activity at a CERCLA site, U.S. EPA is investigating alternatives and determining whether a remedy is protective of human health and the environment with the understanding that such alternatives also includes consideration of the acceptability of short term impacts during the implementation of a remedial action. See 55 Fed. Reg. 8761.

Factor No. 3 - the substance regulated by the requirement: This factor compares "the substances addressed by our requirement to the substances found at the CERCLA site." 55 Fed. Reg. 8744. The waste pile requirements at issue are applicable to facilities that store or treat hazardous wastes in piles. 40 C.F.R. §264.250. Therefore, in order for the waste pile

regulations to be relevant and appropriate, the contaminated soil on site must be sufficiently similar to the hazardous wastes regulated under RCRA and the regulations must be well suited for controlling those contaminants. As discussed in OMC's letter dated May 4, 1990, there is no evidence to show that the wastes present at the former coke plant property are sufficiently similar to either K060 or K087, the only two wastes from coking operations listed under RCRA. When it is not possible to determine whether a CERCLA waste is a RCRA hazardous waste, it should not be presumed that the waste is a RCRA waste. 55 Fed. Reg. 8763.

Like the preamble, the Manual offers guidance in determining whether a RCRA requirement is relevant and appropriate.

"The determination depends first on whether the waste at the site is 'sufficiently similar' to a RCRA hazardous waste. The following . . . provides guidance on evaluating CERCLA waste with regard to this 'sufficiently similar' test U.S. EPA's [hazardous waste] listing decision is based on an analysis of a number of factors, that affect the hazard of the waste including the toxicity of the constituents in the waste stream and their concentration, persistence, and bioaccumulation characteristics, as well as the volume generated and potential for mismanagement. Simply the presence of a hazardous constituent in a waste is not sufficient to automatically consider a waste to be hazardous under RCRA the mere presence of a hazardous constituent in a CERCLA waste does not mean the waste is sufficiently similar to a RCRA hazardous waste to trigger Subtitle C as an ARAR. For example, [waste that is sufficiently similar is] waste in barrels that is virtually identical to a listed waste. . . . By contrast, low concentrations of a hazardous constituent, dispersed in soil over a wide area would generally not trigger Subtitle C as relevant and appropriate." Manual at 2-7. (Emphasis added).

As outlined in OMC's letter of May 4, 1990, in addition to not being the result of a listed waste, the contaminated soil is well within the TCLP criteria, did not test positive for EP toxicity and clearly is not ignitable, reactive or corrosive.^{1/} Characteristic hazardous wastes are regulated

^{1/} The final NCP does not require testing to be conducted if it is clear that the waste does not exhibit a characteristic. 55 Fed. Reg. 8762.

because of the potential impact these characteristics would have on human health and the environment. The material in question contains such low levels of contaminants that it clearly is not hazardous in and of itself. Thus, there is no possible impact created by soil containing low levels of contaminants that would be sufficiently similar to a waste that is ignitable, reactive or corrosive. This soil is not sufficiently similar to the wastes controlled by RCRA, and thus, the waste pile regulations would not be relevant and appropriate.

Factor No. 4 - the actions or activities regulated by the requirement: This factor compares the "actions or activities addressed by a requirement to those undertaken in the remedial action at a CERCLA site." 55 Fed. Reg. 8744. The action regulated by the RCRA waste pile regulations is the storage of hazardous waste in piles. The letter from Canonie dated May 4, 1990 discusses why the handling and storage activities to be conducted in the excavation of the soil are consistent with these waste pile requirements.

In addition, the activities at the site do not trigger the RCRA disposal requirements. The Manual discusses when these requirements are triggered:

"EPA has concluded that moving RCRA hazardous waste . . . constitutes disposal when RCRA hazardous waste is moved from one unit to and placed in another unit. In many cases an area of contamination at a CERCLA site with differing concentration levels of hazardous substances . . . can be viewed as a single large 'unit.' In such cases, when RCRA hazardous waste is moved from one part to another, disposal/placement has not occurred. For example, [in] an area of generally dispersed . . . consolidation of waste from throughout the area into the smaller "landfill" would not constitute disposal/placement under this scenerio" Manual at 2-16.

The Manual also gives examples of when disposal/placement has or has not occurred and states that disposal/placement has not occurred when waste is consolidated within a unit (including an area of contamination that can be viewed as a unit). Id.

The movement of wastes also is highlighted in the final NCP in the context of land disposal and the land disposal restrictions. The term "land disposal" is defined under RCRA Section 3004(k) as including, but not limited to, "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." 42 U.S.C. §6924. As set forth in the final NCP:

"EPA has consistently interpreted the phrase "placement * * * in" . . . to mean the placement of hazardous wastes into one of these units, not the movement of waste within a unit. See e.g. 51 FR 40577 (Nov. 7, 1986) and 54 FR 41566-67 (October 10, 1989) (supplemental proposal of possible alternative interpretations of "land disposal"). EPA believes that its interpretation that the "placement * * * in" language refers to a transfer of waste into a unit (rather than simply any movement of waste) is consistent with a straightforward reading of Section 3004(k)." 55 Fed. Reg. 8759

Since the excavation of the contaminated soil at the former coke plant property is movement within an area of contamination, the requirements governing disposal of hazardous wastes under RCRA have not been triggered.

Other Considerations.

In addition to the consideration of the eight factors used to determine whether a requirement is relevant and appropriate, these factors should be compared to the site-specific characteristics, but that comparison should be refined by considering the nature/characteristics of the site, circumstances of the release, and the proposed response action. Once this comparison is conducted, best professional judgment is to be used when considering this information. See Manual at 1-66.

To be relevant and appropriate, it is not enough that the requirement and the site be only similar, it is just as important that the requirement be well suited to the action to be conducted. "Consideration of only the similarity of certain aspects of the requirement and the site situation constitutes only half of the analysis of whether a requirement is relevant and appropriate." 55 Fed. Reg. 8743. Thus, unless the waste pile regulations are both sufficiently similar and well suited to the site, they do not need to be implemented at the former coke plant property. To do so would require an increased level of control without any increased benefit in the protection of human health and the environment. As discussed above and in previous correspondence, it is apparent that the waste pile regulations are not relevant and appropriate to this site.

One of the key factors in determining relevancy and appropriateness is to review the site-specific circumstances to ensure that the requirement not only be relevant but that it be well suited to the site. The Manual sets forth examples of requirements that are relevant but not appropriate. One example of a waste pile regulation that U.S. EPA identified as only relevant is the "portion

of the design requirements calling for installation of a liner covering all surrounding earth likely to be in contact with the waste." Manual at 1-68. Canonie's design calls for the continuous protection of earth from being affected by the soil excavated from the new slip area, and thus, satisfies this waste pile requirement.

Other examples in the Manual that relate to the activities for excavation of the new slip at the former coke plant property include:

1. A requirement may be relevant to a particular site because it addresses a similar type of facility or entity, but not appropriate because of differences in the duration of the activity.
2. A requirement also may be relevant but not appropriate when another requirement is available that has been designed to apply to this specific situation reflecting an explicit decision about the appropriateness of the RCRA requirement to that situation.
3. Requirements relating to the need for an impermeable cover may not be appropriate in some circumstances if the waste is largely immobile and there will be no direct contact threat.

See Manual at 1-68.

These examples are quite similar to the activities to be conducted at the site. First, the duration of the temporary storage at the site differs from the duration of a RCRA waste pile. Second, Canonie's methodology has been specifically designed for the site and will be just as effective as the waste pile requirements. Finally, the contaminated soil is largely immobile and there will be no direct contact threat. Arguably, there is no need for a impermeable cover; however, Canonie's methodology calls for a HDPE cover to insure even greater protection.

CERCLA Waivers.

Under §121 of CERCLA, ARARs can be waived. Assuming that RCRA is relevant and appropriate to the soil excavation at the former coke plant property, two waivers potentially are applicable. The first is intended to cover activities that constitute "interim measures." Section 121(d)(4)(A) states that a remedial action may be selected that does not attain ARARs if "the remedial action selected is only part of a total remedial action that will

attain such level or standard of control when completed." 42 U.S.C. §9621(d)(4)(A). These interim measures are to be temporary activities that are to be used where complete measures that will attain ARARs will be instituted in a reasonable time. 55 Fed. Reg. 8747 and Manual at 1-7. According to the proposed NCP, this waiver may be invoked if:

- (1) It does not exacerbate the site problems by directly causing additional migration of contaminants, complicating the site response or presenting an immediate threat to human health and the environment; and
- (2) It does not interfere with, preclude or delay the final remedy.

In response to comments in the final NCP, U.S. EPA refused to clarify what constituted "a reasonable time" that the interim measure must be in place because U.S. EPA believed it would be impractical to delineate such a time frame. However, the commenter that requested such clarification suggested that a three year time period was reasonable and U.S. EPA did not comment when it refused to clarify the time period. See 55 Fed. Reg. 8748.

The second waiver that potentially could be invoked covers "equivalent standards of performance." Under §121(d)(4)(D), ARARs may be waived if "the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria or limitation through use of another method or approach." 42 U.S.C. §9621(d)(4)(D).

This waiver may be used when an ARAR requires a particular design or operating standard, but an equivalent result could be achieved using an alternative design or methodology. Manual at 1-75. The purpose of this waiver is to enable the use of alternate, but equivalent technologies. This waiver allows flexibility in the choice of technologies, but requires the alternative to be at least as protective as the ARAR. 55 Fed. Reg. 8748. Factors to be considered are:

- (1) Degree of protection of health and the environment;
- (2) Level of performance of the alternative;
- (3) Reliability of the remedy; and
- (4) The amount of time to achieve the remedial result.

This waiver could be applicable to both the temporary storage of wastes in a manner equivalent to the waste pile rules as well as choosing the final remedy. As discussed in the May 4, 1990 letter by Canonie, the methodology to be used for the temporary storage of the excavated soil is consistent with the waste pile requirements at issue, and thus, satisfies the requirements of this waiver.

Both of these waivers would enable OMC to proceed with the methodology outlined in the Canonie letter. First, Canonie's methodology constitutes interim storage that does not exacerbate the problem and does not interfere with the final remedy that will be completed at the site at some future date. In addition, the methodology is equivalent to the requirements of the waste pile regulations regarding the protection of human health and the environment. Therefore, even if U.S. EPA believes that RCRA is an ARAR at the site, the requirements still would be waived.

RCRA Waste Pile Exemptions.

In addition to being exempt pursuant to the CERCLA waivers, the waste pile regulations allow exemptions to be granted by U.S. EPA from the liner and leachate collection system requirements "based on a demonstration by the owner or operator that alternate design and operating practices together with location characteristics, will prevent the migration of any hazardous constituents into the groundwater or surface water at any future time." 40 C.F.R. §264.254. The regulations specify four factors U.S. EPA should consider in granting this exemption.

U.S. EPA contemplates the applicability of the waste pile exemptions when determining whether the waste pile regulations are ARARs. Specifically, U.S. EPA states "a decision on the applicability of the waste pile regulations will require an analysis of both basic definitions and exemptions." Manual at 2-13.

The design proposed by Canonie is sufficient to prevent the migration of hazardous constituents and, in fact, still includes a liner that is consistent with these requirements. In addition, this excavation and storage is not permanent. In granting the exemption, it is assumed that the migration must be prevented at "any future time." In this case, the contaminated soil will not be permanently stored, and thus, migration only needs to be prevented for as long as the temporary storage occurs.

Conclusion.

For the foregoing reasons, we believe that the waste pile regulations are not relevant and appropriate and urge U.S. EPA to approve the new slip design as submitted by Canonie. In addition, even if you determine that the waste pile regulations do apply, these requirements can be waived under both CERCLA and the waste pile exemptions. If you have any questions, please feel free to contact me.

Sincerely,

Jeffrey C. Fort/mbf
Jeffrey C. Fort

JCF/MBF/bsc
5691f